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Striking Jurors Under Batson v. Kentucky

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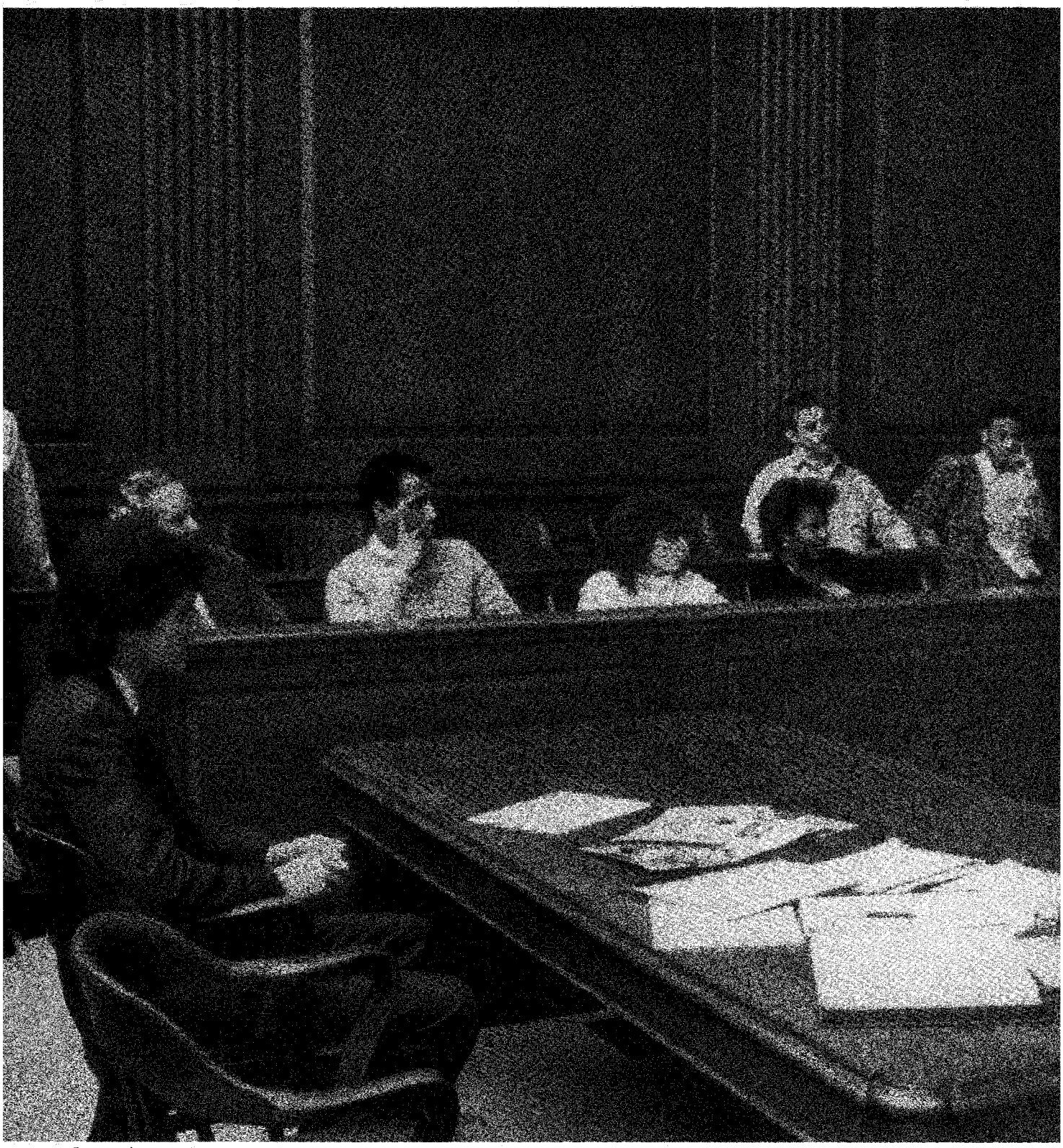

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Batson v. Kentucky

BY GERALD F. UELMEN

Lessons from California

The use of peremptory challenges in selecting juries is subject to new limitations since the Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. ____, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). If a defendant makes a *prima facie* showing that members of his race are being excluded by the prosecutor's use of peremptory challenges, the burden shifts to the prosecution "to come forward with a neutral explanation" for the challenges. 106 S.Ct. at 1723. In overruling its contrary holding in *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), the Court left criminal practitioners to wrestle with the implementation of the decision. Justice White, who authored *Swain*, warned in his concurring opinion that "much litigation will be required to spell out the contours" of the new ruling. 106 S.Ct. at 1725.

As prosecutors, defense lawyers and judges struggle to define the contours of *Batson*, they may be guided by the decisions of the California courts. The California Supreme Court imposed similar limitations on peremptory challenges in 1978, in *People v. Wheeler*, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748. Since *Wheeler*, numerous California cases have dealt with many of the questions left unresolved in *Batson*. Although there are significant differences between *Batson* and *Wheeler*, the courts of other states will frequently find that "the California cases give meaning to the requirements of *Batson v. Kentucky*." *Slappy v. State*, 503 So.2d 350, 355 (Fla.Ct.App. 1987).

At the outset, it should be noted that *Wheeler* was based on the right, under the California state constitution, to a jury panel drawn from a representative cross-section of the population. Although the argument was made in *Batson* that the Court should rely on a parallel right under the Sixth Amendment, the case was decided on traditional equal protection grounds. The difference is significant. At least three limitations flow from the Court's use of an equal protection analysis.

First, only a defendant who is a member of the class being excluded by a peremptory challenge will have standing to seek the protection of *Batson*. Under *Wheeler*, the right to a representative cross-section can be asserted by any defendant to prevent the exclusion of a cognizable group from the jury. Occasionally, a prosecutor might systematically exclude blacks even though a defendant is white, in anticipation of a defense to which it is assumed blacks might be more sympathetic. Examples include a charge of assaulting a police officer, where the defendant is claiming self-defense against police brutality, or if a white defendant has been arrested in a civil rights demonstration. It should be noted that even under *Wheeler*, however, a *prima facie* showing of improper exclusion "gains strength" if the defendant is a member of the excluded group. *People v. Motton*, 39 Cal.3d 596, 217 Cal.Rptr. 416, 422 n.3, 704 P.2d 176 (1985).

This distinction between *Batson* and *Wheeler* was ignored in a recent Arizona case, where a white defendant represented by a black attorney objected to the prosecutor's use of peremptory challenges to remove the only two blacks on the jury panel. The court relied upon *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), and Civil Rights Act cases to confer standing on the defendant. A dissenting judge found *Batson* controlling, but would have conferred derivative standing because the defendant's attorney

was black. *State v. Superior Court (Gardner)*, 732 P.2d 232 (Ariz.Ct. App. 1987). Both positions are misguided if the U.S. Supreme Court sticks with the equal protection clause as the constitutional underpinning for *Batson*. In *Peters v. Kiff*, there was no majority opinion, and neither plurality opinion relied upon equal protection grounds. Three of the justices cited the "due process" clause, and three cited statutory authority to allow a white defendant to challenge the exclusion of blacks from the grand jury which indicted him. Broader standing would be available under the Sixth Amendment analysis. In *Fields v. People*, 732 P.2d 1145 (1987), the Colorado Supreme Court utilized a Sixth Amendment analysis to confer standing upon a black defendant objecting to the exclusion of Spanish-surname jurors.

Second, only the exclusion of racial classes can be challenged under *Batson*. *Wheeler* has extended protection to other groups as well. In *People v. Motton, supra*, the court held black *women* were a cognizable class under *Wheeler*, and in *People v. Turner*, 42 Cal.3d. 711, 230 Cal.Rptr 656, 726 P.2d 102 (1986), the court suggested that exclusion of working-class people would also be impermissible. In *People v. Mora*, 190 Cal.App.3d 208, 235 Cal.Rptr. 340 (1987), the exclusion of youthful jurors was condemned.

While traditional equal protection analysis extends to other groups besides racial minorities, including classifications based on sex, age, religious or political affiliation, marital status, sexual preference or profession, only classifications based on race, ethnicity or national origin have achieved the stature of a "strict scrutiny" analysis. Perhaps that explains why *Batson* was explicitly limited to cases in which the defendant shows he is "a member of a cognizable racial group." 106 S.Ct. at 1723. While a different burden of proof might be appropriate, there doesn't appear to be any reason why *Batson's* protection should not be expanded to other groups. Chief Justice Burger recognized this problem in his *Batson* dissent. 106 S.Ct. at 1737.

Third, *Batson* has no immediate effect upon the use of peremptories in a racially discriminatory manner by the *defense*. Dissenting in *Batson*, Chief Justice Burger questioned whether the Court could rationally hold that defendants are not limited to the same extent as prosecutors in their use of peremptory challenges. 106 S.Ct. at 1738. Such a limitation would require moving beyond the equal protection analysis used in *Batson*, however. *Wheeler* clearly applies equally to prosecution and defense. The only reported case applying the limitation to defense counsel is *Pagel v. California*, 186 Cal.App.3d Supp. 1, 232 Cal.Rptr. 104 (1986), in which the dismissal of a jury panel was upheld after defense counsel used peremptory challenges to strike three black jurors. The defendant was a white accused of a hit and run accident injuring a black child. A petition for *certiorari* to the U.S. Supreme Court was denied.

The problem of defense peremptories is not insignificant. Manuals for defense lawyers abound with advice suggesting the exclusion of jurors based on ethnic and religious stereotypes. The classic advice offered by Clarence Darrow on picking juries advised defense lawyers that it would be malpractice to strike an Irishman, while Presbyterians, Baptists and Lutherans should be avoided. *See* Jeans, *Trial Advocacy*, 7.7. A more recent trial manual suggested that Catholics are "least desirable" for an insanity defense, and that "Negroes are generally ill-equipped to evaluate psychiatric testimony." Shadoan, *Law and Tactics in Federal Criminal Cases* (1964). Prosecutors have no monopoly on racism. Where the victim is a member of a cognizable racial group, defense lawyers frequently use peremptories to remove prospective jurors from the same group. *Batson* itself concedes that the harm of such practices extends beyond the excluded juror to undermine public confidence in the fairness of the system. 106 S.Ct. at 1718.

These three differences should not dissuade lawyers from objecting to the use of peremptory challenges to remove identifiable groups, even if the defendant is not a member of the group, the group is not a racial minority, or the peremptories are coming from the defense. A record should be made, and the exclusion should be challenged on broader Sixth Amendment grounds. The *Batson* Court did not reject the Sixth Amendment claims, but simply reserved them for another day. That day may come soon, but its benefits may be lost in those cases where an appropriate record wasn't made.

Making a *prima facie* showing

In *Batson*, the prosecutor used four of six allowable peremptory challenges to excuse all four black persons on the venire. The majority opinion remanded for a determination whether a *prima facie* showing of purposeful discrimination was made. Under the California cases, this would clearly be sufficient. A *prima facie* case was found in *People v. Clay*, 153 Cal.App.3d 433, 200 Cal.Rptr. 269 (1984), when four of ten challenges removed all blacks, *Holley v. J & J Sweeping Co.*, 143 Cal.App 3d 588, 192 Cal.Rptr. 74 (1983), when three of six challenges removed three out of four blacks, and *People v. Fuller*, 136 Cal.App.3d 403, 186 Cal.Rptr. 283 (1982), when three challenges were used to remove all blacks. In *People v. Rousseau*, 129 Cal.App.3d 526, 179 Cal.Rptr. 892 (1982), on the other hand, the use of two peremptories to excuse the only two black jurors was found insufficient for a *prima facie* showing.

Despite *Rousseau*, one should not read the California cases as permitting up to three strikes before you're "out." While cases involving three or more strikes of an identifiable group have generally concluded the *prima facie* showing was sufficient, there is no reason why two strikes

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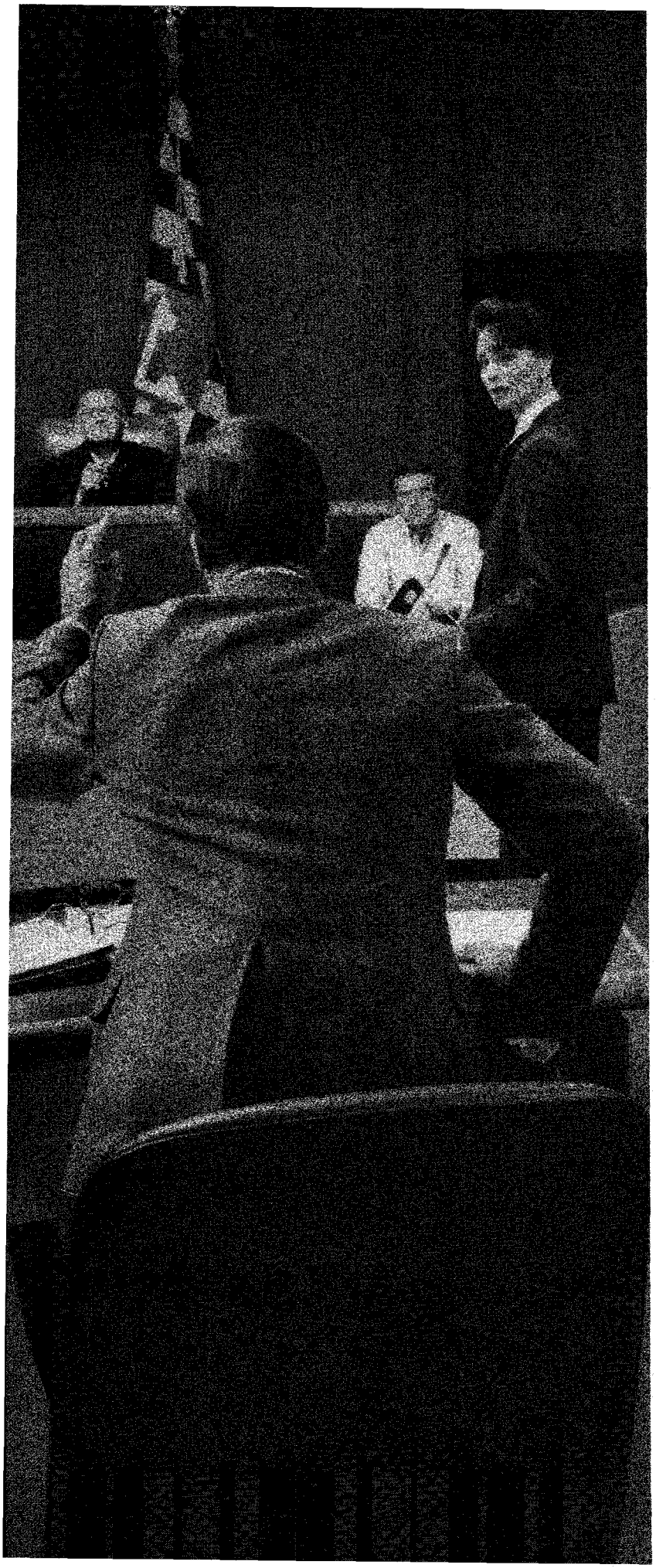

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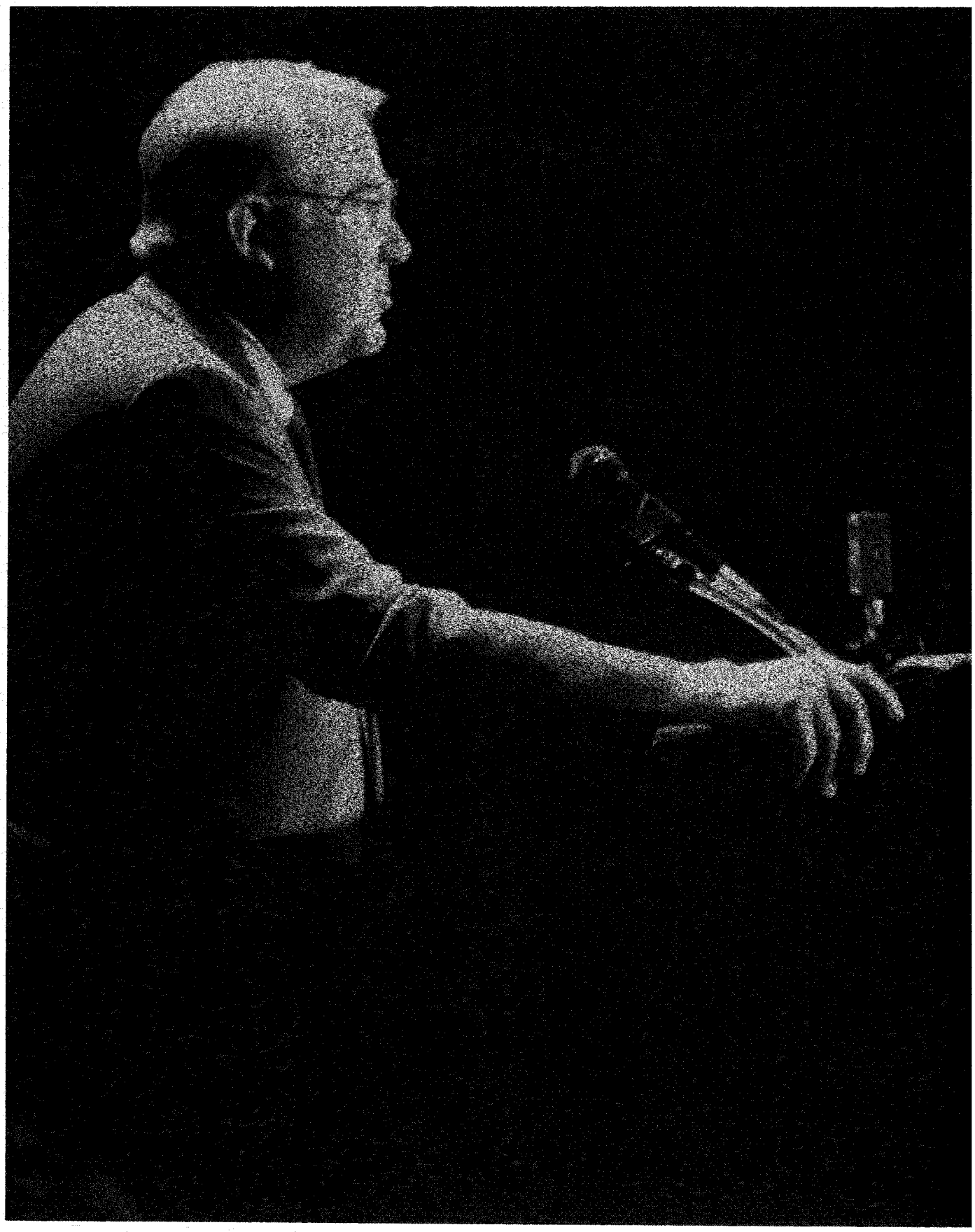

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Batson

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wouldn't be enough in combination with other circumstances. In assessing the *prima facie* showing, California courts have also looked at the intensiveness of *voir dire* questioning of challenged jurors by counsel. If questioning was "desultory," an improper motive is considered more likely. Since few federal judges allow counsel to personally conduct *voir dire* questioning, this factor may not have the same significance in federal cases.

A *prima facie* showing does not require that *all* members of the group have been removed, although that will certainly strengthen the showing. In *People v. Motton, supra,* the prosecutor argued that the *prima facie* showing was rebutted by the fact that the prosecution passed the jury while blacks were still on it. The court noted how easily jury selection could be manipulated if a "pass" with blacks still on the jury were regarded as conclusive. 217 Cal.Rptr. at 423.

In cities where blacks or other minorities predominate, a *prima facie* case may be much more difficult to establish. In Washington, D.C., for example, where 70 percent of prospective jurors are black, a recent opinion noted that the prospect of an all-white jury is "non-existent," so *Batson* had little relevance. The greater danger was that defense attorneys would eliminate all the whites from juries of black defendants, a practice *Batson* leaves unregulated. *United States v. Cosby,* 40 Cr.L.Rptr. 2411 (D.C.Super.Ct., 1987).

Frequently, the systematic exclusion of a racial group is not apparent from the record. Jurors are not ordinarily asked to state their race, and counsel's characterizations based on observations may be the only record available. In *People v. Motton, supra,* for example, after the California Supreme Court reversed a death penalty case because blacks were systematically excluded by the use of peremptory challenges, a juror who sat on the case called the press to report she was black. *See* 71 *A.B.A.J.* 22 (Nov., 1985). The court was unmoved by the revelation. As it noted in its opinion, "discrimination is more often based on appearances than verified racial descent," so a *prima facie* case could be based on systematic excusal of jurors who *appeared* to be black. 217 Cal.Rptr. at 420-2

The burden of justification

In concurring in *Batson,* Justice Thurgood Marshall lamented the difficulty of assessing the explanations prosecutors offer for their peremptories. "Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons." 106 S.Ct. at 1728. If the prosecutor explains that the black juror he struck appeared "sullen," is that good enough? Justice Marshall noted that unconscious racism may lead prosecutors and judges to characterize a black juror's conduct as "sullen" when the same conduct of a white juror would be ignored.

The risk is well illustrated by some of the earliest cases decided after *Batson* was announced. In *Branch v. State,* 40 Cr.L.Rptr. 2215 (1986), the Alabama Court of Criminal Appeals found the prosecutor's explanations for peremptorily excusing all six black jurors were sufficient, including explanations that one juror "appeared to have kind of a dumfounded or bewildered look on her face," another appeared "unkept" and "gruff," and a third was observed "frowning" and seemed in a "bad mood." In *Wallace v. State,* 41 Cr.L.Rptr. 2019 (1987), the same court upheld the peremptory dismissal of six more black jurors, indicating satisfaction with prosecutorial explanations that neither a black homemaker nor a black female student would know "what life is like out on the street," a black "grandmotherly type" would be "too sympathetic," and a black with a beard might "go against the grain," especially since the defense attorneys also had beards.

California courts have regularly rejected such explanations, because they don't relate to "specific bias." As the California Supreme Court observed in *People v. Trevino,* 39 Cal.3d 667, 217 Cal.Rptr. 652, 704 P.2d 719 (1985), a "specific reason" isn't equivalent to "specific bias." A bias relating to the particular case on trial or the parties or witnesses is required. Thus general explanations such as a juror's perceived inability to make a decision have been rejected. *People v. Washington,* 188 Cal.App. 3d 794, 234 Cal.Rptr. 204 (1987). Significantly, Justice Powell's majority opinion in *Batson* declares that general assertions aren't enough, and that the prosecutor must articulate an explanation "related to the particular case to be tried." 106 S.Ct. at 1723. This can be readily translated into a test of specific bias similar to that utilized in California.

The California courts have also imposed upon trial judges a duty to conduct a probing inquiry, rather than to simply accept prosecutorial explanations at face value. As described in *People v. Hall,* 35 Cal.3d 161,167, 197 Cal.Rptr. 71, 75, 672 P.2d 854 (1983), "this demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known." The consistency of the prosecutor's approach should be probed. If the prosecutor claims a black juror was excused because he seemed "confused," the treatment of white jurors who also indicated confusion should be analyzed. *See People v. Turner,* 42 Cal.3d. 711, 230 Cal.Rptr. 656, 726 P.2d 102 (1986).

Counsel who anticipate using peremptories to strike minority jurors should carefully utilize *voir dire* examination to demonstrate specific bias. While the showing need not rise to the level necessary to sustain

a challenge for cause, it may be advisable to assert a challenge for cause before exercising the peremptory. The California cases sustaining a showing of specific bias present examples of careful *voir dire* questioning of the challenged jurors preceding the challenge. In *People v. Chambie,* 189 Cal.App.3d 149, 234 Cal.Rptr. 308 (1987), for example, the use of peremptories to excuse five out of six black jurors was sustained where *voir dire* questioning demonstrated two challenged jurors had relatives who were prosecuted for crimes, one was a "defense oriented" first year law student, one felt there was a "great" possibility a woman could lie about being raped, one voiced concern about the financial hardship of serving on the jury, and one had served on the jury in a case previously tried by the prosecutor which ended in acquittal.

In those federal courts that do not permit counsel to personally conduct *voir dire,* it may be difficult to make this kind of record. Counsel should request the judge to ask specific follow-up questions before exercising a peremptory. Even if the request is denied, it will corroborate counsel's good faith concerns about specific bias. Information elicited in pretrial questionnaires sent to prospective jurors can also be helpful in supporting a show of specific bias. *U.S. v. Woods,* 812 F.2d 1483 (4th Cir. 1987).

Procedural remedies

Batson speaks only in collective terms in defining the prosecutor's burden to justify peremptory challenges. What if the prosecutor offers acceptable explanations for some, but not all, of the challenges? The California cases have held that an improper challenge to any one juror is all that is necessary to establish a *Wheeler* violation. *People v. Washington,* 188 Cal.App.3d 794, 234 Cal.Rptr. 204 (1987). Since *Wheeler* is based on the right to a representative cross-section, however, it doesn't necessarily follow that an improper challenge to one juror will establish a *Batson* violation. A violation of equal protection may require a more systematic exclusion.

If the prosecutor fails to meet the explanatory burden imposed by *Batson,* what should the trial judge do? Reinstate the challenged jurors? Declare a mistrial and start over? Or simply strike the jury panel and call in a fresh panel of jurors? Can the trial judge preclude peremptory challenges by the prosecution? In *Batson,* Justice Powell noted the various approaches taken by some federal courts, *see Booker v. Jabe,* 775 F.2d 762, 773 (6th Cir. 1985); *U.S. v. Robinson,* 421 F.Supp. 467, 474 (D.Conn. 1976), concluding that the variety of jury selection practices followed made it inappropriate to offer instructions how its ruling should be implemented. Nor are these questions addressed in reported California cases. In the single case involving improper peremptory challenges by the defense, however, the trial court dismissed the selected jurors and called in a fresh jury panel. *Pagel v. California,* 186 Cal.App.3d Supp. 1, 232 Cal. Rptr. 104 (1986).

If the trial judge concluded that the prosecutor's explanation rebuts a claim of purposeful discrimination, what weight will be given to this factual determination on appeal? In *Batson,* Justice Powell noted that since findings related to discrimination largely turn on evaluation of credibility, "a reviewing court ordinarily should give those findings great deference." 1066 S.Ct. at 1724, n.21. While California cases pay lip service to this principle, "decisions demonstrate however, 'ordinarily' does not mean 'inevitably': in some cases the reviewing court may conclude that the explanation is inherently implausible in light of the whole record." *People v. Turner,* 230 Cal.Rptr. at 661, n. 6.

What if the trial court never required an explanation from the prosecutor, erroneously concluding a *prima facie* showing had not been made? That's precisely the posture of *Batson* itself, and the Court remanded to give the prosecutor an opportunity to explain. California cases are more selective in use of the remand. Where three years elapsed between the trial and the review, for example, the California Supreme Court simply reversed the conviction, concluding:

> It is unrealistic to believe that the prosecutor could now recall in greater detail his reasons for the exercise of the peremptory challenges in issue, or that the trial judge could assess those reasons, as required, which would demand that he recall the circumstances of the case, and the manner in which the prosecutor examined the venire and exercised his other challenges. *People v. Hall,* 197 Cal.Rptr. at 77.

Conclusion

Concluding his dissent in *Batson,* Chief Justice Burger joined his colleagues in wishing 7,000 state trial judges and 500 federal trial judges well as they seek to "find their way through the morass the Court creates today." 106 S.Ct. at 1741. Justice Marshall, in concurring, suggested that the protection erected by the Court may be illusory, and called for banning the peremptory challenge entirely. California has been through the "morass" and pursued the "illusion" for nine years. Most criticism of the procedures mandated in California remains unsubstantiated. *People v. Hall, supra* at 76. While the California cases offer no easy answers to the challenges posed by *Batson,* they have certainly fostered a deeper consciousness of the haunting presence of racism at the bar of justice. Lawyers and judges are achieving the realization that ethnic stereotypes have no place in the process of jury selection. Lawyers must be called to account for the apparent exclusion of minorities in jury selection, and judges must scrutinize those explanations carefully. If we expect jurors to lay aside their prejudices, we must start by purging the jury selection process of our own. **CJ**